Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Rulemaking 97-04-011 (Filed April 9, 1997)
Order Instituting Investigation to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Investigation 97-04-012 (Filed April 9, 1997)

OPINION ON REVISED DISCLAIMER LANGUAGE AND ITS IMPLICATIONS ON THE PENALTIES ASSESSED AGAINST PACIFIC GAS AND ELECTRIC COMPANY IN DECISION (D.) 98-11-026 AND D.99-03-025

I. Summary

This decision revises the disclaimer requirement set forth in Section V.F.1 of the Affiliate Transaction Rules (Rules) so that the revised language the Commission adopted for San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas) will be made applicable to all utilities covered by the Rules. In D.99-09-033, we revised Section V.F.1 as to SDG&E and SoCalGas because the original language was not narrowly tailored to achieve an appropriate balance between the two utilities' commercial speech rights and the Commission's substantial interest in promoting competition.

This decision also considers the implications of this revision on the penalty we assessed against Pacific Gas and Electric Company (PG&E) in D.98-11-026 and D.99-03-025. We determine that PG&E's penalty should be vacated because

it was based on PG&E's violation of a rule that we have subsequently found was not narrowly tailored to achieve an appropriate balance between utilities' commercial speech rights and the Commission's interest in promoting competition. By implication, the language was overbroad and in violation of the First Amendment of the United States Constitution.

II. The Commission Revises Rule V.F.1 as to SDG&E and SoCalGas

In D.99-09-033, the Commission addressed SDG&E and SoCalGas' application for rehearing concerning the disclaimer requirement set forth in the Rules. The Commission upheld the disclaimer requirement but revised the language of the disclaimer for the reasons stated above. Although the Commission expressly limited this decision to the two petitioning utilities, we also anticipated that this decision might generate similar petitions for modification of Rule V.F.1 from other utilities covered by the Rules.

III. Administrative Law Judge (ALJ) Ruling Requesting Comments on Whether the Changes to Rule V.F.1 Should Apply to All Utilities

No parties filed petitions for modification, but because of the PG&E penalty issue discussed below, and in order to provide certainty, a December 3, 1999 ALJ ruling requested parties' comments on whether Rule V.F.1 should be modified to apply the modifications adopted in D.99-09-033 for SDG&E and SoCalGas to all utilities covered by the Rules.

The ruling proposed comments on the following proposed modification:

F. Corporate Identification and Advertising

1. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be used by the affiliate or in any material circulated by the affiliate,

unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

a. The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc.], the utility," and the affiliate "is not regulated by the California Public Utilities Commission."

b. In the case of energy service provider affiliates, the disclaimer will be:

The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc], the utility, and the California Public Utilities Commission does not regulate the terms of [the affiliate's] products and services."

The application of the name / logo disclaimer is limited to the use of the name or logo in California.

IV. Responses to the ALJ Ruling

PG&E, Southern California Edison Company (Edison), and the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN), jointly, filed responses and replies to the ALJ ruling.[1]

PG&E and Edison argue that the Commission adopted the original disclaimer language after notice and comment, without hearings, and made the modification to the disclaimer as to SDG&E and SoCalGas as a matter of law, because the original language was not narrowly tailored to achieve an appropriate balance between the rehearing applicants' commercial speech rights and the Commission's substantial interest in promoting competition. The utilities argue that this rationale applies with the same force to PG&E and Edison

[1] We grant ORA and TURN's motion to file their comments one day late.

as it does to SDG&E and SoCalGas. Edison points out that such modification would be in keeping with substantially uniform rules for all utilities covered by the Rules, which is a policy the Commission articulated in its Order Instituting Rulemaking leading up to the Rules' adoption. (PG&E also argues that a utility should not be viewed in violation of Rule V.F.1 if it continues to use the original disclaimer language on documents which have been printed in bulk, such as business cards, etc.)

ORA and TURN argue that the Commission should not modify Rule V.F.1 so that it applies to all utilities because D.99-09-033 is based on the specific facts and circumstances presented by shared use of the Sempra name and logo by SDG&E and SoCalGas. Therefore, ORA and TURN argue that there is no basis for extending the changes ordered in the disclaimer to other utilities.

V. Implications of Disclaimer Modification on PG&E Penalty

In D.98-11-026, rehearing denied in D.99-03-025, the Commission assessed a $1,680,000 penalty against PG&E for allowing its affiliate, PG&E Energy Services, to issue a printed advertisement that did not comply with the legibility requirements for disclaimers as set forth in Rule V.F.1. Although the advertisement in question contained the entire text of the required disclaimer, it was not plainly legible as required by the Rules.[2] This penalty consists of $17,500 for each of the 20 violations associated with the March 16, 1998 "High Voltage" advertisement and $19,000 for each of the 70 violations associated with the

[2] We found PG&E violated Rule V.F.1 in D.98-04-029, and requested further information before we assessed the penalty in D.98-11-026. In D.98-04-029, we also gave further guidance on what is "clearly legible" under Rule V.F.1.

remaining advertisements. (PG&E ran the same advertisement in various publications at various times.) At the time PG&E ran the advertisements and the Commission assessed this penalty, the Commission had not revised the disclaimer requirement for SDG&E and SoCalGas.

After the Commission issued D.99-09-033 modifying the disclaimer as to SDG&E and SoCalGas, the Commission issued D.99-09-074. This decision reopened the instant rulemaking / investigation to consider the possible implications that D.99-09-033 may have on the PG&E penalty issues, ordered briefing, and stayed D.98-11-026 and D.99-03-025 pending the outcome of the reopening of the PG&E penalty proceeding.[3]

VI. Responses to D.99-09-074

PG&E, Edison and ORA, TURN and Enron Corp. (jointly) filed responses or replies. Both PG&E and Edison argue that the Commission acknowledged in D.99-09-033 that the original disclaimer rule violates the First Amendment unless modified. Therefore, they argue that this Rule cannot be lawfully enforced against PG&E. Because the penalty determinations in D.98-11-026 and

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[3] PG&E filed a petition for writ of review of D.98-11-026 and D.99-03-025 in the California Supreme Court. PG&E simultaneously filed a petition for writ of review before the California Court of Appeal, essentially raising the same claims in both petitions.

On June 9, 1999, the California Court of Appeal issued a ruling denying the Commission's motion to dismiss PG&E's petition for writ of review. It also denied the Commission's request that the Court consider the merits of PG&E's petition in light of the Commission's answer before the California Supreme Court, and ordered briefing in accordance with California Rules of Court, Rule 58(b). Neither the California Court of Appeal nor the California Supreme Court had acted on PG&E's petitions as of the issuance of D.99-09-074, and they were subsequently dismissed without prejudice in light of our reopening this proceeding.

D.99-03-025 were based on enforcement of an unlawful rule, PG&E argues that the decisions and associated penalty determinations should be vacated. If the Commission decides to reconsider the amount of the penalty, PG&E requests evidentiary hearings.

ORA, TURN and Enron Corp. argue that D.99-09-033 applied only to SDG&E and SoCalGas, and not PG&E. Moreover, D.99-09-033 addressed the content of the disclaimer, and D.98-11-026 and D.99-03-025 penalized PG&E based on the legibility of the disclaimers. According to ORA, TURN and Enron Corp., the penalty should still stand because even if the modified disclaimer were in effect at the time PG&E ran its advertisements, PG&E would still be in violation of the Rules.

VII. Discussion

A. Modification of Rule V.F.1 for All Utilities Covered by the Rules

D.99-09-033 revised Rule V.F.1's disclaimer requirement as to SDG&E and SoCalGas under the following rationale:

> "We have considered our rejection of the request for a revised disclaimer. After careful reconsideration and further reflection, we now believe that the disclaimer set forth in Rule V.F.1 is not narrowly tailored to achieve an appropriate balance between the rehearing applicants' commercial speech rights and our substantial interest in promoting competition. We find the practical aspects raised by the rehearing applicants in their petition for modification and application for rehearing persuasive in determining that we have erred. Thus, we conclude that this disclaimer needs to be and should be changed to meet the standards established by the courts for the last prong of the Central Hudson test.

> "Accordingly, we will grant rehearing in order to correct this error. We believe that additional hearings, either through notice and comments or evidentiary hearings, are not necessary to make the correction. The record for the instant rulemaking / investigation (R.97-04-011 / I.97-04-012), which includes the record evidence for the petition for modification, is sufficient. Thus, relying on the record for this proceeding, we adopt the following revised disclaimer, which is narrowly tailored to achieve our stated objectives for promoting competition." (D.99-09-033 at p. 12.)

Although our holding in D.99-09-033 was expressly limited to SDG&E and SoCalGas, the rationale the Commission used to modify the decision (i.e., that the original disclaimer was not narrowly tailored to achieve an appropriate balance between commercial speech rights and the government's interest in promoting competition) applies to all utilities covered by the Rules. Indeed, the Commission rejected SDG&E and SoCalGas' efforts to distinguish their situation from that of other utilities and concluded the evidentiary record supported a disclaimer requirement for all utilities covered by the Rules because exempting SDG&E and SoCalGas from the disclaimer requirement could potentially result in customer confusion and misleading customers about their competitive choices.

Therefore, we modify Rule V.F.1 of the Affiliate Transaction Rules as set forth in the ordering paragraphs so that all utilities are now subject to Rule V.F.1 as modified by D.99-09-033. However, we clarify that utilities will not be found in violation of the Affiliate Transaction Rules if they comply with either version (the original or modified) of Rule V.F.1.

B. Suspension of PG&E Penalty

D.99-09-033 found the original version of Rule V.F.1 to be overbroad and modified it accordingly. The modification involved removing part (3) of Rule V.F.1 which required the utilities to include as part of any disclaimer "you

do not have to buy the affiliate's products in order to continue to receive quality regulated services from the utility."

PG&E's penalty was based on a violation of a Rule the Commission has subsequently found to be overbroad (and by implication, unconstitutional as violating the First Amendment of the United States Constitution). Because PG&E's penalty was based on a violation of a Rule which we have found to be overbroad, we vacate the penalty we imposed on PG&E in D.98-11-026 and D.99-03-025.

We do not agree that PG&E should be fined for violating the legibility requirement of Rule V.F.1. In this case, the harm of PG&E's legibility violation would be to interfere with the reader's ability to read the disclaimer. However, the Commission has subsequently found this disclaimer to be overbroad.

This decision is not intended to minimize the importance of Rule V.F.1's disclaimer. Indeed, we affirm that the modified disclaimer is an integral part of the Rules with which all covered utilities must comply.

VIII. Comments on Draft Decision

The draft decision of ALJ Econome in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7. The following parties filed comments or replies: ORA and TURN (jointly) PG&E, SDG&E and Southern California Edison Company. We do not change the draft decision in response to the comments.

Findings of Fact

1. Although our holding in D.99-09-033 was expressly limited to SDG&E and SoCalGas, the rationale the Commission used to modify the decision (i.e., that the original disclaimer was not narrowly tailored to achieve an appropriate

balance between commercial speech rights and the government's interest in promoting competition) applies to all utilities covered by the Rules.

2. The penalty assessed against PG&E in D.98-11-026 and D.99-03-025 was based on a violation of a Rule the Commission subsequently found to be overbroad (and by implication, unconstitutional as violating the First Amendment of the United States Constitution) unless modified.

Conclusions of Law

1. Rule V.F.1 of the Affiliate Transaction Rules should be modified as set forth in the ordering paragraphs so that all utilities are now subject to Rule V.F.1, as modified by D.99-09-033.

2. Utilities should not be found in violation of the Affiliate Transaction Rules if they comply with either the original or modified version of Rule V.F.1.

3. Because PG&E's penalty was based on a violation of a Rule which we have found to be overbroad, we vacate the penalty we imposed on PG&E in D.98-11-026 and D.99-03-025.

4. In order to provide certainty to the utilities covered by the Rules and other affected parties, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Rule V.F.1 of the Affiliate Transaction Rules (Rules) adopted by Decision (D.) 97-12-088, and modified by D.98-08-035 and other decisions, shall be modified to apply to all utilities covered by the Rules as follows:

F. Corporate Identification and Advertising

1. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be

used by the affiliate or in any material circulated by the affiliate, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

a. The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc.], the utility," and the affiliate "is not regulated by the California Public Utilities Commission."

b. In the case of energy service provider affiliates, the disclaimer will be:

The affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc], the utility, and the California Public Utilities Commission does not regulate the terms of [the affiliate's] products and services."

The application of the name / logo disclaimer is limited to the use of the name or logo in California.

2. The $1,680,000 penalty that the Commission imposed on Pacific Gas and Electric Company in D.98-11-026 and D.99-03-025 for violating Rule V.F.1 shall be vacated.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.